BAUER (MALAYSIA) SDN BHD

v.

DAEWOO CORPORATION

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
[CIVIL APPEAL NO: W-02-817-98]
29 SEPTEMBER 1999

ARBITRATION: *Arbitration agreement - Construction - Arbitration clause in contract - Scope and effect - Whether applied to matters in subsequent contracts between parties - Incorporation of clause by reference - Principles*

ARBITRATION: *Arbitrator - Jurisdiction - Dispute in separate contracts - Whether covered by arbitration agreement - Whether arbitrator had no jurisdiction to adjudicate - Challenge to arbitrator's jurisdiciton - Doctrine of estoppel or waiver - Applicablity to jurisdictional defect - Whether respondent estopped from asserting arbitrator's lack of jurisdiction*

CONTRACT: *Construction - Arbitration agreement - Scope and application - Whether arbitration clause applied to matters in dispute*

The respondent is the main contractor for the construction of certain works at the Plaza Rakyat project in Kuala Lumpur. In 1994, the respondent entered into a contract with the appellant and sub-contracted a portion of the works to the latter. The contract ('the first work order') *inter alia* had an arbitration clause for resolution of disputes between the parties.

Later, by separate 'work orders', the respondent sub-contracted other portions of the works to the appellant. On 22 April 1995, the appellant terminated the first work order and made clear that the other work orders were to be governed by new terms and contracts. And so, for work order No. A-042 that followed, the appellant categorically noted that 'This work is a separate contract and not part of the first work order'.

Subsequently, the disputes relating to the termination of the first work order were referred to arbitration and pleadings were exchanged. The respondent questioned the arbitrator's jurisdiction to adjudicate, saying that the matters in dispute ('the 8 work orders') were not covered by the arbitration clause, but the objection was dismissed. Thereafter the respondent amended its pleading, for reasons that the matters in dispute had been settled and claimed a declaration to that effect. Further, so as to finally dispose of

the arbitration, the respondent invited the arbitrator to determine whether there was a second commercial settlement between the parties. The invitation, however, was declined by the arbitrator.

The respondent applied to the High Court for a declaration that the arbitrator had no jurisdiction to adjudicate on the dispute. The learned judge found for the respondent ruling that the arbitration clause did not extend to the 8 work orders. The learned judge also found, as a matter of construction, that the arbitration clause in the first work had not in any way been incorporated by reference into the 8 work orders. The appellant appealed and the primary issues that arose were: (i) whether upon a proper construction of the relevant documents and the conduct of the parties, the arbitration clause did extend to the 8 work orders; and (ii) if it did not, whether the respondent, by reason of its conduct in the arbitration, is precluded from asserting lack of jurisdiction in the arbitrator.

Held:

Per Gopal Sri Ram JCA

[1] The first work order expressly describes 'the works' that fall within it. It is only differences or disputes that arise in connection with the works that must be held to fall within the scope of the clause. The learned judge was correct in finding that the arbitration clause, upon its proper construction, does not extend to the 8 work orders.

[2] It is clear from the words and actings of the appellant that it did not intend to treat the arbitration clause as having been incorporated in each of the disputed work orders. The facts and circumstances support the conclusion that the parties proceeded towards each other upon the basis that the first work order was at an end, and the work orders in dispute were separate and distinct contracts that had no nexus whatsoever with the first work order.

[2a] Also, bearing in mind the termination letter of 22 April 1995, the appellant's comment on work order No. A-042, its submission in the court below, and the conventional basis upon which the parties dealt with each other, it is unjust and inequitable for the appellant to now contend that the arbitration clause in the first work order was incorporated by reference into the other work orders in dispute. It is thus not open to the appellant to contend that the arbitration clause was incorporated into the 8 work orders. The learned judge, consequently, had applied the right principles and had not misdirected himself in the approach he took.

[3] The correctness of the judge's finding on the construction point, however, does not put an end to the matter. For, it remains to be answered the question of whether the respondent, in the circumstances and in law, was precluded from challenging the arbitrator's jurisdiction.

[4] As a general rule, mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.

[5] The respondent, having taken issue with the arbitrator's jurisdiction, did more than just merely participating in the arbitration proceedings. The respondent amended its pleading, alleged that the matters in dispute had been settled and also claimed a declaration to that effect. This was a matter certainly outside the scope of the arbitration agreement. The respondent also invited the arbitrator to decide the facts pleaded in the amendment as a preliminary issue, on the ground that it would finally dispose of the arbitration. These actings of the respondent threw open the enforceability of the appellant's claim under the 8 work orders that fell outside the scope of the arbitration clause.

[5a] Having thus invited the arbitrator to deal with the very issue which it had previously contended the arbitrator had no jurisdiction to decide, the respondent must be taken as having elected to abandon its earlier challenge to the arbitrator's jurisdiction. The respondent is precluded from asserting that the arbitrator had no jurisdiction to adjudicate upon the disputes raised before him.

[Appeal allowed; declarations granted by court below set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden adalah kontraktor utama untuk sebahagian kerja-kerja pembinaan di projek Plaza Rakyat di Kuala Lumpur. Pada tahun 1994, responden memasuki suatu perjanjian dengan perayu dan mengkontrakkan sebahagian dari kerja-kerja pembinaan kepada perayu. Perjanjian tersebut ('arahan kerja pertama') antara lain mempunyai suatu peruntukan timbangtara bagi menyelesaikan masaalah yang timbul di kedua-dua pihak.

Selepas itu, melalui 'arahan-arahan kerja' yang berasingan, responden mengkontrakkan pula beberapa kerja tambahan kepada perayu. Pada 22 April 1995, perayu menamatkan arahan kerja pertama dan menjelaskan bahawa arahan-arahan kerja yang lain adalah dikawal oleh terma dan kontrak baru. Maka dengan itu, bagi arahan kerja No. 042 yang menyusul, perayu secara berterus terang mengatakan 'Kerja ini adalah kontrak yang berasingan and bukan sebahagian dari arahan kerja pertama'.

Kemudian, pertikaian berhubung penamatan arahan kerja pertama dirujuk kepada penimbangtara dan kedua pihak telah bertukar pliding. Responden mempersoal bidangkuasa penimbangtara untuk menimbangtara atas alasan bahawa halperkara-halperkara yang dipertikaikan ('8 arahan kerja tersebut') tidak termasuk dalam klausa timbangtara, tetapi bantahan tersebut telah ditolak. Berikutnya, responden meminda plidingnya, dengan alasan bahawa halperkara yang dipertikai telah diselesaikan dan memohon perisytiharan berhubungnya. Juga, guna untuk menyelesai timbangtara dengan secara muktamad, responden meminta penimbangtara memutuskan samada wujud satu penyelesaian komersial yang kedua di antaranya dengan perayu. Permintaan tersebut, bagaimanapun, ditolak oleh penimbangtara.

Responden memohon kepada Mahkamah Tinggi untuk suatu perisytiharan bahawa penimbangtara tidak mempunyai bidangkuasa untuk mengadili pertikaian. Hakim bijaksana mendapati untuk responden, sambil memutuskan bahawa klausa timbangtara tidak meliputi 8 arahan kerja tersebut. Hakim bijaksana juga memutuskan, sebagai suatu perkara takrifan, bahawa klausa timbangtara di dalam arahan kerja pertama juga tidak dimasukkan ke dalam 8 arahan kerja secara rujukan. Perayu merayu dan isu yang timbul ialah: (i) samada, berdasarkan tafsiran dokumen-dokumen dan juga kelakuan pihak-pihak, klausa timbangtara meliputi 8 arahan kerja tersebut; dan (ii) jika tidak meliputi, samada, kerana tingkah lakunya dalam prosiding timbangtara, responden tidak boleh lagi membangkitkan soal ketiadaan bidangkuasa penimbangtara.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Arahan kerja pertama menerangkan dengan jelas 'kerja-kerja' yang terkandung di dalamnya. Pertikaian-pertikaian yang diliputi oleh skop klausa timbangtara hanyalah pertikaian yang berkaitan dengan kerja-kerja. Hakim bijaksana adalah betul dalam memutuskan bahawa klausa timbangtara, diberikan tafsirannya yang tepat, tidak meliputi 8 arahan kerja tersebut.

[2] Dari percakapan dan perbuatannya, responden jelas tidak mengganggap klausa timbangtara sebagai telah diserap ke dalam setiap satu dari arahan-arahan kerja yang dipertikaikan. Fakta dan halkeadaan yang wujud menyokong rumusan bahawa masing-masing pihak berurusan atas dasar bahawa arahan kerja pertama telah tamat, dan arahan-arahan kerja yang dipertikaikan adalah suatu kontrak lain dan berasingan yang tidak mempunyai apa-apa kaitan dengan arahan kerja pertama.

[2a] Juga, mengambilkira surat penamatan kerja 22 April 1995, komen perayu pada arahan kerja No. A-042, hujah penggulungan perayu di mahkamah di bawah, dan cara berurusan konvensional di antara pihak-pihak, ianya tidak adil bagi perayu untuk kini mengatakan bahawa klausa timbangtara dalam arahan kerja pertama telah diserap secara rujukan ke dalam arahan-arahan kerja lain yang dipertikaikan. Ianya dengan itu tidak terbuka bagi perayu untuk berhujah bahawa klausa timbangtara telah diserap ke dalam 8 arahan kerja tersebut. Hakim bijaksana, dengan itu, telah menggunapakai prinsip yang betul dan tidak tersalah arah dalam pendekatan yang beliau ambil.

[3] Ketepatan rumusan yang dibuat oleh hakim bijaksana berhubung perkara tafsiran, bagaimanapun, tidak menyelesaikan masaalah kes di sini. Ini kerana, persoalan samada responden, dalam halkeadaan yang wujud dan di sisi undang-undang, dihalang dari mencabar bidangkuasa penimbangtara, masih perlu dijawab.

[4] Sebagai suatu kaedah am, semata-mata mengambil bahagian di dalam prosiding timbangtara tidak akan menyembuh apa-apa kecacatan bidangkuasa. Ianya menurut bahawa, sesuatu pihak yang datang samada secara sukarela atau dengan protes dan mengambil bahagian dalam prosiding di hadapan penimbangtara adalah tidak dihalang dari kemudiannya mencabar keputusan penimbangtara tersebut atas alasan ketiadaan bidangkuasa.

[5] Responden, setelah mencabar bidangkuasa penimbangtara, melakukan lebih dari hanya mengambil bahagian dalam prosiding timbangtara. Responden telah meminda plidingnya, mengata bahawa perkara-perkara yang dipertikai telah diselesaikan dan memohon perisytiharan berkenaannya. Ini adalah halperkara yang berada diluar skop perjanjian timbangtara. Responden juga meminta penimbangtara untuk memutuskan fakta-fakta dalam pliding sebagai satu isu awalan, atas alasan bahawa ianya akan menyelesaikan timbangtara dengan muktamadnya. Tingkah responden ini membuka luas pelaksanaan tuntutan perayu di bawah 8 arahan kerja tersebut yang tidak diliputi oleh klausa timbangtara.

[5a] Dengan meminta penimbangtara memutuskan suatu isu yang responden sebelum itu mengatakan penimbangtara tiada bidangkuasa untuk memutuskannya, responden mestilah dianggap sebagai telah memilih untuk menggugurkan bantahannya tentang bidangkuasa penimbangtara. Responden adalah dihalang dari menekankan bahawa penimbangtara tiada bidangkuasa untuk mengadili pertikaian yang dibangkitkan di hadapannya.

[Rayuan dibenarkan; perisytiharan oleh mahkamah di bawah diketepikan.]

Case(s) referred to:

Amalgamated Investment & Property Co Ltd v. Texas Commerce International Bank Ltd [1981] 3 All ER 577 ***(foll)***

Aughton Ltd v. MF Kent Services Ltd [1991] 57 BLR 1 ***(refd)***

Badiaddin Mohd Mahidin & Anor v. Arab-Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(foll)***

British Crane Hire Corp Ltd v. Ipwich Plant Hire Ltd [1975] QB 303 ***(refd)***

Davies v. Price [1865] 34 LJ QB 8 ***(refd)***

Giffen (Electrical Contractors) Ltd v. Drake & Scull Engineering Ltd [1993] 37 Con LR 84 ***(refd)***

Latham v. Foster's Australian Fibres Ltd [1926] VLR 427 ***(foll)***

Radha Kanta Dass v. Baerlein Bros Ltd AIR [1929] Cal 97 ***(refd)***

Rebenta Pty Ltd v. Oceanview Apartments Pty Ltd [1997] 14 BCLR 232 ***(foll)***

Shankar Lal v. Jainey Bros AIR [1931] 136 ***(refd)***

State Government of Sarawak v. Chin Hwa Engineering Development Co [1995] 4 CLJ 1 ***(refd)***

Temperley Steam Shipping Co v. Smyth & Co [1905] 2 KB 791 ***(refd)***

The Abu Road Electricity & Industries Co Ltd v. Industrial Gases Ltd AIR [1977] Cal 482 ***(refd)***

The Annefield [1971] P 168 ***(refd)***

TN Rao v. Balabhadra AIR [1954] Mad 71 ***(foll)***

Union of India v. Rallia Ram AIR [1963] SC 1685 ***(refd)***

Waverly Jute Mills Co Ltd v. Raymon & Co AIR [1963] SC 90 ***(refd)***

Yong Mok Hin v. United Malay States Sugar Industries Ltd [1967] 2 MLJ 9 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 2

Contracts (Malay States) Ordinance, s. 63

Other source(s) referred to:

The Law and Practice of Commercial Arbitration in England, Mustill & Boyd, 2nd edn, pp 133-4

For the appellant - RR Sethu (Tan Swee Im with him); M/s David Chong & Co

For the respondent - R Navaratnam (MK Chan with him); M/s Azman, Davidson & Co

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

Preliminary

This appeal involves two matters. The first concerns the construction of a contract. It is a fairly straightforward question and gives rise to little or no difficulty.

The second, however, is a point of some importance. It concerns the law governing arbitrations. It bears upon a party's right to challenge an arbitrator's jurisdiction. The decision of this court upon the point will, I apprehend, have considerable effect upon the conduct of arbitrations. The point has therefore given me much anxiety. We heard arguments upon it for the best part of two days and reserved judgment. Counsel were then afforded an opportunity to put in written submissions.

In order to appreciate the arguments addressed to us it is necessary to hearken to the factual matrix against which this appeal rests. I might add for completeness that I will throughout this judgment refer to the Arbitration Act 1952 as "the Act".

The Background

There is a large construction in progress along Jalan Pudu in Kuala Lumpur. It is the site of a project called Plaza Rakyat. It will, when completed, act as a junction within the City for all light rail traffic systems operating within Metropolitan and Greater Kuala Lumpur. It will also contain various other facilities for the benefit of the general public. Being an immense structure, it involves several different phases of construction. One of these involves the construction of a diaphragm wall and the installation of ground anchors. It is with this aspect of the project that the dispute at the core of the present appeal is concerned. I will for convenience refer to the subject matter as "the works".

The respondent is the main contractor for the works. On 3 May 1994, it entered into a sub-contract with the appellant. This sub-contract is the form prescribed by the Architects Association of Malaysia and is known to members of the profession as "the PAM form of contract." The parties have throughout their dealings referred to this sub-contract as "the first work order" or "work order No. 008". I shall do likewise.

The first work order has an arbitration clause. It is of very wide purport and is to be found in every PAM form of contract.

Following the execution of the first work order, the respondent issued 12 work orders. Eight of these are in issue in the present case. The learned judge has set them all out in his judgment. I do not propose to repeat them here. But I will refer to two sets of work orders (making up the total of the eight orders in dispute) that were drawn to our attention by counsel during argument. They are referred to as the second and third work orders.

The second work order first is made up of a set of four work orders dated 13 July 1994. It is collectively referred to as "work order No. 7". It is expressed to be for soil nailing work alongside Jalan Pudu and involves six types of work.

On 22 April 1995, the first work order No. 008 was terminated. Nevertheless, on 11 May 1995, the respondent issued to the appellant a third work order (referred to by the parties as "work order No. 016"). It involved four types of additional work for which extra payment was to be made. It was also for soil nailing, but on this occasion was to be carried out along the front of a school abutting the construction site.

The appellant accepts that work order No. 016 which was issued after the termination of the first work order No. 008 formed the basis of the contractual relationship between the parties. But the appellant says that it nevertheless formed part and parcel of the original contract.

Later, the disputes consequent upon the termination of the first work were referred by the parties to an arbitrator. Pleadings were exchanged. These included the appellant's points of claim and the respondent's points of defence and counterclaim. Paragraphs 8, 9 and 10 of the points of claim are material to the present appeal. They read as follows:

> 8. By a letter dated 22 April 1995 from the Claimant to the Respondent, sent by registered post the Claimant determined their employment under the Contract (PRP-A-008) in accordance with Clause 26(1)(iv) of the PAM Form by reason of the carrying out of substantially of the whole of the uncompleted works relating to the Ground Anchors having been postponed for a continuous period of more than one month by reason of the Respondent's instructions ("the First Termination").
>
> 9. As the First Termination was only in respect of the Phase 1 Works pursuant to the Contract, the Claimant continued with other works instructed by way of the Work Orders, namely the Work Orders listed at paragraphs 6(b) and 6(c). The Works pursuant to Work Order PRP-A-005 as referred to in paragraph 6(a) had been practically completed by the date of the First Termination.
>
> 10. Also despite such termination, the Claimant continued to carry out additional works subsequently instructed by the Respondent, by the acceptance of further Work Orders issued by the Respondent, namely the Work Orders listed at paragraphs 6(d) - 6(f) and 6(h) - 6(1) hereinabove.

The respondent, from the very outset, took the point that not all the work orders which the appellant claimed were the subject matter of the dispute were covered by the arbitration clause in the first work order. This is to be found in the letter of the respondent's former solicitors dated 12 May 1997, challenging the appellant's letter giving notice of its intention to proceed to arbitration.

Later, by a letter dated 10 November 1997, the respondent wrote to the arbitrator making its stand abundantly clear. It made several points in that letter. Three of these are relevant to the present appeal. First, it argued that the eight work orders that lay at the heart of the appellant's claim were not covered by the arbitration clause in the first work order. Second, it invited the arbitrator to inquire into his jurisdiction to adjudicate upon the appellant's claim. Third – and I think this is really the telling point in the case – the respondent made its position absolutely clear in the following terms:

> To avoid being accused by the Claimant that our client has taken any step in the arbitration proceeding, our client could not file and serve its Points of Defence and Counterclaim until these jurisdiction issues are resolved. Moreover, further participation in the reference may prejudice our client's case on jurisdiction. Our client also prefers that these matters be cleared up at an early stage of the reference.

The respondent extended a copy of this letter to the appellant, who put also its views in writing to the arbitrator. Then, by letter dated 21 November 1997, the arbitrator wrote to both parties informing them that he had jurisdiction over the subject matter of the dispute and making it amply clear that he would proceed *ex parte* and make his determination in default of the respondent's failure to lodge its defence and counterclaim. The arbitrator's decision gave the respondent no choice in the matter. Quite sensibly, rather than permit its case to go by default, it put in its points of defence and counterclaim. In its pleading, the respondent answered the points raised by the appellant in relation to the eight disputed work orders. It also claimed for damages against the appellant and a declaration that the termination of the contract by the appellant was wrongful. The matters as they thus stood may have produced no prejudice to the respondent in relation to the stand it had taken to the lack of the arbitrator's jurisdiction. But then it did something which has placed it in difficulty.

On 22 February 1998, the respondent amended its pleading, alleging that the matters in dispute between the parties had been settled and claimed a declaration to that effect. Then, five days later, on 27 February 1998, the respondent's solicitors wrote to the arbitrator inviting him to decide as a preliminary issue whether there had been a second commercial settlement between the parties of the matters in dispute. They went on to invite the arbitrator to make a determination upon that issue as it would finally dispose of the arbitration. This request of the respondent is in direct conflict with its earlier stand on the question of the arbitrator's jurisdiction. For, having taken an objection to the arbitrator deciding upon the dispute relating to the eight work orders on the ground that they fell outside the scope of the arbitration clause, the respondent would now appear to be adopting a volte face by calling

upon the arbitrator to decide upon an issue that was admittedly outside the scope of the arbitration clause. What effect in law, if any, these actings of the respondent have upon the question of jurisdiction is a matter that must be addressed later. Suffice to say at this stage that it is this apparently inconsistent conduct of the respondent that has given rise to much difficulty in this appeal.

It may be added for completeness that by a letter dated 28 March 1998, the arbitrator declined the invitation extended him by the respondent. The attempt to ventilate the so-called second commercial settlement therefore never took off the ground. Again, the significance if any, that may be attached to this fact is a matter that must also be dealt with later in this judgment.

To revert to the chronology, on 8 May 1998, the respondent took out an originating summons claiming, *inter alia*, a declaration that the arbitrator had no jurisdiction to adjudicate upon the dispute relating to the eight work orders in question. The learned judge found for the respondent and held the arbitrator to have no jurisdiction primarily, if not solely, upon the ground that the arbitration clause did not, as a matter of pure construction extend to the eight work orders in question.

So much for the facts.

The Issues

It now becomes necessary to identify the two issues that have arisen for decision in this appeal. I have referred to them generally earlier in this judgment. They are:

(i) whether upon a proper interpretation of the documents relied upon by the parties, the arbitration clause extends to the eight work orders in question ("the construction point"); and

(ii) if it does not, then, whether the respondent, in view of its conduct in the arbitration, is precluded from asserting lack of jurisdiction in the arbitrator to make a determination upon the issues arising from the joinder in the pleadings lodged by the respective parties ("the jurisdiction point").

Although both issues appear to have been canvassed before the learned judge, he confined himself to the first and did not deal with the second. That does not relieve this court of its duty to consider both issues. This is not a case where we are at a disadvantage by reason of an absence of views from the learned judge. The facts relevant to the second issue are not in dispute. Indeed, they form common ground between the parties. All that remains for determination is the legal result that ought to flow from them. This is

accordingly a case where it is unnecessary to remit the matter to the learned judge to obtain the benefit of his views upon it. Neither side has argued in favour of such a course of action. If authority is required in support of the view I take of the matter, it is to be found in *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9. It is a case where the former Federal Court permitted an appellant to argue a point based on s. 63 of the Contracts (Malay States) Ordinance 1950 although it had not been taken at first instance for the first time because "all the facts necessary for the determination of the point of law raised under s. 63 of the Contracts (Malay States) Ordinance were before the trial court" (per MacIntyre J, at p. 17.)

Needless to say, that a conclusion that the learned judge was wrong in the view he took upon the first issue, would render the second academic. If, as a matter of construction, the arbitration clause is found to extend to the eight work orders, it matters not in what manner the respondent acted.

Each issue must now be separately addressed.

The Construction Point

The rival submissions advanced in this appeal reveal the point upon which the controversy turns. And in this context, some recall of the facts relevant to the issue is unavoidable.

The appellant's argument is that although the eight work orders stand apart from the first work order (in which is to be found the arbitration clause), they are directly referable to the first work order. Accordingly, the arbitration clause is to be regarded as having been incorporated in all latter eight work orders. As against this, the respondent argues that the arbitration clause does not extend beyond the scope of the works in the first work order. The issue, therefore, as correctly identified by the learned judge, is whether the arbitration clause is confined to disputes arising under the first work order or whether it extends to the eight work orders. That, as I have already said, is a question of pure construction. The approach to be and the principles by which the issue falls to be resolved are well settled and beyond argument.

The starting point must be the arbitration clause itself. Counsel on both sides of the Bar have referred us to several cases on the question of interpretation. While I have found the authorities interesting, I must confess that I have derived little assistance from them.

In my judgment, the true ambit of the arbitration clause in the present instance falls to be determined by reference to its own language. Although decided cases do assist in providing general guidelines, they are, save in very exceptional cases, merely decisions upon their own facts and are not to be taken as establishing the meaning that is to be assigned to the words used by parties to express themselves in a given case.

As Sir Thomas Bingham M.R. (now Lord Bingham, L.C.J.) said in *Giffen (Electrical Contractors) Ltd. v. Drake & Scull Engineering Ltd.* [1993] 37 Con. LR 84, at p. 90:

> ... it follows that we have to look very closely at the particular language of the provisions that we have to construe and the particular circumstances or the contract in question. Unless clear rules have been laid down – and they sometimes have been – for example, as to the meaning to be given to the expression 'condition' in the context of charterparty and a bill of lading, one has, I think to be cautious in reasoning from one case to another since cases appear to turn very much on their own particular terms and their own particular facts.

In the present case, the relevant portion of the arbitration clause reads:

> In the event that any disputes or differences should arise ... either during the progress or after the completion or abandonment of **the works,** as to any matter or thing of whatsoever nature arising thereunder or in connection therewith then such disputes or differences shall be referred to arbitration. (Emphasis added.)

The first work order expressly describes "the works" that fall within it. It is only differences or disputes that arise in connection with the works that must be held to fall within the scope of the clause. In the absence of other facts, it would be a strain upon the language of the clause to suggest that it extends to cover matters not within the scope of the first work order. I therefore find myself in agreement with the learned judge that the arbitration clause, upon its proper construction, does not extend to the eight work orders.

The next question is whether there are any facts and circumstances in the present case that warrants a finding that the parties either expressly or through their conduct agreed to extend the arbitration clause to the eight work orders. The appellant's case is that the facts and circumstances surrounding the case, in particular, the contemporaneous documentary evidence, reasonably support the conclusion that the parties intended to incorporate the arbitration clause into the eight work orders. The respondent disputes this argument with vigour.

We were once again regaled with authorities where a term either was, or was not, held to have been incorporated into a contract by reference thereto in another document. Again, I must say that the cases cited by counsel amount to no more than illustrating the application of a well-established principle to particular fact patterns. Upon the principle there is no dispute. It was stated with clarity by Venkatarama Aiyar J, in *T.N. Rao v. Balabhadra* AIR [1954] Mad. 71, at p. 72:

When a contract in writing is signed by parties, they are bound by the terms contained therein whether they take the trouble of reading them or not. This principle has been extended to cases where the contract does not actually contain the terms but a reference is made to another document or contract where those terms are to be found. The reason for holding that those terms must be taken to have been incorporated by reference in their signed agreement is that it was possible for any of them to look into that document and ascertain the terms. An examination of the authorities in which this view has been adopted shows that they are either cases in which the other contract is one between the same parties and therefore the terms including the arbitration clause might be taken to have been within the knowledge of the parties; or cases in which there is a reference to a specific document which was in existence and whose terms could easily be ascertained if the parties wanted to. It is reasonable to hold that when the parties had referred to a document which was in existence they had knowledge or what comes to the same thing, could have had knowledge, of all the terms contained in that document and an arbitration clause contained in that document must, therefore, be held to be binding on them exactly as if it had been incorporated in extenso in the signed contract. The foundation of this reasoning is the existence of another specific document containing an arbitration clause. It is essential that the terms of an agreement must be precise and definite. This applies as much to an arbitration agreement as to other agreements. Before holding that the parties have agreed in writing to refer their dispute to arbitration and in the absence of such a clause in the agreement actually signed by the parties there must at least be a specific contract or document containing such a clause in respect of which it might be said that it had been incorporated in the agreement of the parties by reference.

In *The Annefield* [1971] P. 168, Brandon J, (later Lord Brandon of Oakbrook), found the relevant authorities as establishing four propositions. He summarised them as follows (at p. 173 of the report):

First, in order to decide whether a clause under a bill of lading incorporates an arbitration clause in a charterparty it is necessary to look at both the precise words in the bill of lading alleged to do the incorporating, and also the precise terms of the arbitration clause in the charterparty alleged to be incorporated. Secondly, it is not necessary, in order to effect incorporation, that the incorporating clause should refer expressly to the arbitration clause. General words may suffice, depending on the terms of the latter clause. Thirdly, when the arbitration clause is, by its terms, applicable only to disputes under the charterparty, general words will not incorporate it into the bill of lading so as to make it applicable to disputes under the contract contained in, or evidenced by, that document. Fourthly, where the arbitration clause by its terms applies both to disputes under the charterparty and to disputes under the bill of lading, general words of incorporation will bring the clause into the bill of lading so as to make it applicable to disputes under that document.

Similarly, in *The Abu Road Electricity & Industries Co. Ltd. v. Industrial Gases Ltd.* AIR [1977] Cal. 482, at p. 488, Datta J, after a review of the authorities which included the decision in *"The Annefield" (ibid)*, said:

> On a review of the above cases the following principles regarding the incorporation of the provisions of one agreement into another agreement appear to have been laid down.
>
> (a) a clause in an earlier contract can be imported into a subsequent contract if the language is appropriate unambiguous and clear.
>
> (b) such clause in the earlier contract can be written in bodily into the later contract if there is no inconsistency or vagueness or uncertainty.
>
> (c) a clause in the earlier contract which is germane to the subject-matter of the later contract may be incorporated therein by general words though some degree of manipulation may be involved.
>
> (d) in respect of a clause in the earlier agreement which is not directly germane to the subject-matter of the later agreement, it is not permissible to construe general words as incorporating such clause therein when the clause in terms does not relate to transactions of such later contract. Such clause can only be incorporated in the later contract by clear words either in the earlier or subsequent contract.

For my part, I would, with respect, enter a caveat in respect of what was said in *The Annefield (supra)* and *The Abu Road Electricity & Industries Co. Ltd. v. Industrial Gases Ltd (ibid)*. The four principles set out by the learned judges in these two cases are not to be treated as immutable rules carved upon a tablet of stone. They are but guidelines that assist a court when making a determination whether a term ought to be regarded as having been incorporated into a contract by reference to another document.

In my judgment, at the end of the day, whether an incorporation by reference was intended by the parties in a particular case is a question that must be resolved according to the peculiar facts of the individual case. The authorities appear to me to form a spectrum. At one end of that spectrum are cases where no difficulty has been experienced in holding that a term has been incorporated by reference to another document either because of the use of clear and unequivocal language or equally clear implication. *Temperley Steam Shipping Co. v. Smyth & Co* [1905] 2 KB 791 was such a case.

An example of a case at the other end of the spectrum is *Aughton Ltd. v. M F Kent Services Ltd.* [1991] 57 BLR 1. It is a decision relied upon by the learned judge in arriving at his conclusion. The facts of that case were as follows. The plaintiffs were the sub-sub-contractors of the defendants under six contracts for electrical works. The defendant, by a letter, made an offer

to the plaintiff to enter into a sub-sub-contract No. 2. The letter of offer made it clear that the previous correspondence and documentation would form part of sub-sub-contract No. 2. The "previous correspondence and documents" included the sub-contract between the defendant and one Press Construction Ltd which contained an arbitration clause. The plaintiff brought an action against the defendant to recover monies allegedly due to them under each sub-sub-contract. The defendant applied to have the action stayed in reliance of the arbitration clause in the sub-contract it had with Press Construction Ltd. The judge at first instance refused a stay on the ground that the general incorporation of the arbitration clause was insufficient. The plaintiff appealed. The English Court of Appeal (Ralph Gibson LJ and Sir John Megaw) dismissed the appeal. Ralph Gibson LJ, accepted that the arbitration clause had become incorporated into the sub-sub-contracts but ruled against its enforceability. Sir John Megaw, on the other hand held that the words used in the defendant's letter of offer were not sufficiently distinct and specific to incorporate the arbitration clause.

Counsel for the appellant has, both in his oral and written argument, levelled several criticisms against the decision in *Aughton*. Among these ranked the fact that the two member Bench was not unanimous upon the reasons for the ultimate decision upon the point in issue. The reasons given by Sir John Megaw for his conclusion were attacked as revealing too narrow an approach, not warranted by the authorities. Counsel said that in the light of the several infirmities in the decision in *Aughton*, the learned judge was wrong in accepting it as authority. Two reasons make it unnecessary for me to deal with these criticisms. First, there is the route I propose to take in deciding whether the learned judge was right in the conclusion he arrived at on this part of the case. Second, and more importantly, I notice that *Aughton* was dealt with by the Full Bench of the Court of Appeal in *Giffen (supra)* with no difficulty. Much the same criticism as addressed before us was levelled against the judgment of Sir John Megaw by counsel in that case, who invited the court to prefer Ralph Gibson's LJ approach. The Master of the Rolls (with whom Russell LJ and Hobhouse LJ agreed) had this to say of that criticism:

> I do not, for my part, think it is necessary for us to examine the extent or the difference in principle between Ralph Gibson LJ and Sir John Megaw which may, on closer examination, turn out to be a good deal narrower than might, at first sight, appear.
>
> I consider that the authorities, although interesting, do not throw real light on the problem which we have to resolve, which is whether the language or the Drake & Scull sub-contract is such as to point to a clear indication to incorporate the arbitration provision of the main contract. As I have already indicated, I consider that the language does not have that effect.

I must say that I find myself in much the same position in the present instance.

I have thus far referred to authorities that deal with an incorporation of a term as a matter of language, whether express or by necessary implication. But that a term may be incorporated not only by words but also by conduct is illustrated by *British Crane Hire Corporation Ltd. v. Ipswich Plant Hire Ltd.* [1975] QB 303, where it was proved that the hirer of a crane expected that the hire would be subject to certain conditions imposed by the supplier. There had been no course of dealings between the parties. Neither had the terms actually specified by the supplier been drawn to the attention of the hirer before the contract was concluded. Yet, it was held, upon the basis of a common understanding derived from the conduct of the parties, that the suppliers terms had been incorporated into the contract of hire by reference.

That brings me to the present case.

The learned judge concluded, as a matter of construction, that the arbitration clause in the first work order had not been incorporated by reference into each of the work orders in question. Having read and re-read the judgment under appeal, I am unable to find any misdirection by the judge in the approach he took to the question posed to him for decision. Neither do I find any error in the principles that he applied. The effect he gave the documents in issue was entirely in keeping with the language employed by the parties to express themselves. I therefore find myself in agreement with the learned judge that as a matter of pure construction, the arbitration clause in the first work order was not incorporated in the other work orders in question.

There is a further ground upon which, I think, the judge's decision may be upheld. Counsel for the respondent included it as part of his main argument. But I am of the view that it may be treated independently.

Counsel on both sides have, in their oral and written arguments referred in depth to the set of documents relevant to each of the eight work orders. Having examined these documents and the other facts and circumstances relied upon by the disputants, and after a careful consideration of the submissions of counsel, I am persuaded that it is not open to the appellant to contend that the arbitration clause was incorporated into the eight work orders in dispute. There are several factors supporting such a conclusion. Suffice that I make mention of three.

(i) In its letter of termination dated 22 April 1995, the appellant made it abundantly clear that it was putting an end to the contractual relationship it had with the respondent and that any further work – and this would include works under the subsequent work orders – will be under a new contract on fresh terms. The actual words of the appellant are:

> Under clause 26(I)(c)(iv) of the Conditions of Contract (PAM), we therefore have to advise you that since the carrying out of substantially the whole of the uncompleted Works has now been suspended for a continuous period of more than one month by reason of your postponement instruction referred to above, our employment for this work is determined and hence this work no longer needs to be executed by us.
>
> However, we would be willing to carry out this work **under a new contract** at new rates and prices to be agreed, as well as the remaining Phase 2 Diaphragm Wall works as previously set out in our letter of April 3, 1995 Ref: L95/9437/321-TD/nq. (emphasis added)

It is noteworthy that there is no mention in the appellant's letter of any of the terms, including the agreement to arbitrate, that were contained in the first work order. So far as the appellant was concerned, the old contract under the first work order was at an end and what it was looking forward to was the possibility of a new contract on fresh terms. When its conduct is objectively viewed, it is apparent that the appellant did not intend for any part of the first work order to survive the termination for the purpose of incorporation into any fresh contract.

(ii) On 26 April 1996, the respondent issued work order No. A - 042. It is to be found at page 929 of the appeal record. It was for secant pile work in respect of a bus ingress finger. The terms and conditions of the offer were spelt out in detail. There was no reference whatsoever to the first work order. On 23 May 1996 the appellant replied. It made several amendments to the terms of the offer. But it did not say that the other terms of the contract would be the same as those set out in the first work order. In fact, the last sentence of the appellant's said letter reads: "This work is a separate contract and not part of work order PRP-A-008." The appellant thus, in my view, evinced a clear intention that the first work order was not to be available for revival or reference.

(iii) There is the concession by the appellant in its written submission before the learned judge that all the work orders issued after its letter of termination cannot be variations to the first work order. It follows from this that the appellant accepts that each of the work orders in dispute were separate contracts having no connection whether by reference or otherwise with the first work order. Being separate contracts, the language that is necessary to reasonably support the finding of an intention to incorporate the arbitration clause by reference is clearly absent.

Thus, it is clear from the words and actings of the appellant that it did not intend to treat the arbitration clause as having been incorporated in each of the disputed work orders. Indeed, the facts and circumstances of the case support the conclusion that the parties in this case proceeded towards each other upon the basis that the first work order was at an end and that the work orders in dispute were separate and distinct contracts that had no nexus whatsoever with the first work order. It does not therefore lie in the appellant's mouth to now assert an incorporation of the arbitration clause.

The matter is, I think, concluded by authority against the appellant. In *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1981] 3 All ER 577, at p. 584, Lord Denning M.R. stated the proposition in language that merits recall:

> If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not. Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it.
>
> To use the phrase of Latham CJ and Dixon J in the Australian High Court in *Grundt v. Great Boulder Pty Gold Mines Ltd* [1937] 59 CLR 641 the parties by their course of dealing adopted a 'conventional basis' for the governance of the relations between them, and are bound by it. I care not whether this is put as an agreed variation of the contract or as a species of estoppel. They are bound by the 'conventional basis' on which they conducted their affairs. The reason is because it would be altogether unjust to allow either party to insist on the strict interpretation of the original terms of the contract when it would be inequitable to do so, having regard to dealings which have taken place between the parties.

The principle thus stated by the Master of the Rolls has been applied in our courts. See, *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331.

In my judgment, the point of construction that forms this part of the case, whether approached in the traditional manner as a matter of pure interpretation or on the alternative basis of an estoppel by convention would produce the same result. Put in another fashion, the documents on their true construction do not have the effect of incorporating the arbitration clause by reference as contended by the appellant. Alternatively, the conventional basis upon which the parties dealt with each other makes it unjust and inequitable for the appellant to now contend that the arbitration clause in the first work order was incorporated by reference into the other work orders in dispute.

Accordingly, the learned judge was, in my judgment, correct in holding, based upon the construction of the documents before him, that the arbitrator lacked jurisdiction over the eight work orders that formed the subject matter of the appellant's claim in the arbitration proceedings. However, the correctness of the learned judge's decision upon the construction point does not, as I have earlier said, put an end to the matter. There is still left the second question and it is this to which I now turn.

The Jurisdiction Point

Before embarking upon a recall of the factual aspects relevant to the second issue, I think it necessary to state what I apprehend to be the principles of law that governs this part of the case.

To begin with, it is important to recognise that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an agreement, there is no jurisdiction. And as a general rule mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.

Thus in *Davies v. Price* [1865] 34 LJQB 8, at p. 9 one finds Pollock CB, saying:

> I cannot distinguish, in my own mind, between a man being a judge and a man being a judge *quoad hoc*. I do not see why – if an arbitrator deals with a matter beyond his jurisdiction, and the party protests, doubting the arbitrator's authority, and yet goes on to take care of his own interests as he best can, saying, I am not sure that you are right – he is bound by the award. Why is he disentitled to protect himself from the consequences of his own view as to the arbitrator's authority being wrong? I think it a much more difficult question whether the defendant could have availed himself of a decision in his favour.

Again, in *Waverly Jute Mills Co. Ltd. v. Raymon & Co* AIR [1963] SC 90, at p. 97, Venkatarama Aiyar J, said:

> Now an agreement for arbitration is the very foundation on which the jurisdiction of the arbitrators to act rests and where that is not in existence, at the time when they enter on their duties, the proceedings must be held to be wholly without jurisdiction. And this defect is not cured by the appearance of the parties to those proceedings, even if that is without protest, because it is well settled that consent cannot confer jurisdiction. But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators, and in that event the proceedings thereafter before them might be upheld as referable to that agreement and the award will not be open to attack as without jurisdiction.

That a party may lie still and defend himself from the summary enforcement of an award on the ground that the arbitrator lacked jurisdiction was recognised by the Federal Court in *State Government of Sarawak v. Chin Hwa Engineering Development Co.* [1995] 3 MLJ 237, where Edgar Joseph Jr. FCJ said (at p. 244):

> We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. Mustill and Boyd on *Commercial Arbitration* (2nd edn) at p. 546 have instanced two situations when the passive remedy would be available; namely:
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> (1) where the award is so defective in form or substance that it is incapable of enforcement;
>
> (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.
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> In the circumstances, we agree with the submission of the Attorney General that it was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s. 27 of the Act by relying on its complaint that the arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension, these being matters in dispute which were outside the scope of cl. 43 of the contract. Whether or not the employer is entitled to succeed in this contention is, of course, a separate matter, and it is to this question that we must now direct our attention.

So far as is relevant to the present appeal, that then is the state of the law relating to an arbitrator's jurisdiction. The question which has arisen acutely for decision in connection with the second issue in this appeal is whether a party may by its conduct be precluded from asserting lack of jurisdiction.

I must confess that when I first raised the question during argument, I had some doubts about whether the doctrine of estoppel, acquiescence or waiver – call it what you may, for it is all but part and parcel of the same doctrine – had any application to jurisdictional defects. For I am aware of the salutary rule that neither consent nor waiver may confer jurisdiction upon a tribunal. Our courts have held that often enough. See, *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd.* [1998] 2 CLJ 75; [1998] 1 MLJ 393.

But I cannot help but notice that the cases where the rule has been applied with unbending strictness are concerned with the jurisdiction of either the ordinary courts or statutory tribunals or other creatures of statute. We are here not concerned with an adjudication by such a tribunal. We are here concerned

with the private and consensual adjudication of disputes. It appears a little odd to me that if parties may agree to refer some of their disputes to an arbitrator selected by them that either of them cannot by words or conduct acquiesce to have the same arbitrator decide other disputes between them although these are not covered by their original agreement. And if one of them chooses to do so, he may, in my view be estopped from later asserting that the arbitrator lacked jurisdiction.

I find support for the view I take of the matter from the following passage in *"The Law and Practice of Commercial Arbitration in England"* by Mustill & Boyd (2nd edn) at pp. 133-4 which I quote with approval:

> Most agreements to refer existing disputes to arbitration are made expressly, and usually in writing rather than orally. But an agreement to arbitrate a dispute and to be bound by the arbitrator's award may be inferred from the conduct of the parties without any express agreement. *The most usual case of such an agreement is where an arbitration is already in progress under an existing express agreement and a fresh claim is brought before the arbitrator, which is outside the scope of the original agreement.* If no objection is made to the arbitrator's lack of jurisdiction to deal with the fresh claim, both parties will be bound by an award on the merits of the claim. The arbitrator's authority to make such an award derives from an agreement to be inferred from the conduct of the parties. (emphasis added)

That, I think, is the position in the present instance. This is not a case where the respondent, having taken issue with the arbitrator's jurisdiction, merely proceeded to participate in the proceedings before him. Had this been the case, it would have been most difficult for the appellant to make the submission it has made before us. For the matter would have been concluded by a long and unbroken line of authority, including such cases as *Davies v. Price (ibid).*

But the respondent went considerably further. As may be recalled, the respondent amended its pleading on 22 February 1998, and alleged that the matters in dispute between the parties had been settled and claimed a declaration to that effect. This was a matter certainly outside the scope of the arbitration agreement. On 27 February 1998 it wrote to the arbitrator inviting him to decide the facts pleaded in the amendment as a preliminary issue on the ground that it would finally dispose of the arbitration. These actings of the respondent threw open the enforceability by the appellant of its claim under the eight work orders that fell outside the scope of the arbitration clause. Having thus invited the arbitrator to deal with the very issue which it had previously contended the arbitrator had no jurisdiction to decide, the respondent must be taken as having elected to abandon its earlier challenge to the arbitrator's jurisdiction.

That an estoppel may operate in such circumstances as the present is demonstrated by *Latham v. Foster's Australian Fibres Ltd.* [1926] VLR 427. I would add that both *Latham's* case and the passage from Mustill & Boyd to which I have already referred were applied by Rolfe J, in *Rebenta Pty. Ltd. v. Oceanview Apartments Pty Ltd.* [1997] 14 BCLR 232.

Counsel for the respondent has argued against the view that has commended itself to me. His says that if accepted, it would run counter to the principle established in such cases as *Davies v. Price (supra)*. The answer to this argument is provided by *Waverly Jute Mills Co. Ltd. v. Raymon & Co (supra)*, where Venkatarama Aiyar J, after stating the principle that consent cannot confer jurisdiction, went on to make the following qualification (at p. 98 of the report):

> But in such a case there is nothing to prevent the parties from entering into a fresh agreement to refer the dispute to arbitration while it is pending adjudication before the arbitrators, and in that event the proceedings thereafter before them might be upheld as referable to. that agreement, the award will not be open to attack as without jurisdiction. But it will make all the difference in the result whether the parties have entered into an arbitration agreement as defined in s. 2(a) of the Arbitration Act or have merely taken steps in the conduct of proceedings assumed or believed to be valid. In the former case the award will be valid; in the latter, a nullity.

The facts of the present case to which I have already referred demonstrate that this is not a case where the respondent merely took steps in the conduct of the arbitration proceedings. This is a case where the respondent requested to go forward upon a matter that fell well outside the scope of the arbitration agreement. And the dispute it raised directly brought into issue all those matters over which the respondent had earlier claimed the arbitrator lacked jurisdiction. I think that in the circumstances of the present case a reasonable man in the shoes of the appellant would have been entitled to assume that the respondent was no longer pursuing its challenge to the arbitrator's jurisdiction.

Counsel's response to this is that the view earlier adverted to cuts across s. 2 of the Act. That section says that an arbitration agreement "means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not". The respondent argues that there is here only one arbitration agreement. It is that contained in the first work order. Since there is no other written agreement – by which counsel means a formal agreement executed by both parties – to refer the other disputes, the arbitrator had no jurisdiction to enter upon the dispute relating to the eight work orders.

With respect, I am unable to accept this argument. The phrase "written agreement" in s. 2 of the Act does not demand of a formal agreement executed by the parties to the dispute. The agreement to which the section refers may be gathered from either a single document or a series of documents or, in some cases, a party may be estopped from asserting that there is no agreement. This principle is amply covered by authority.

In *Radha Kanta Dass v. Baerlein Bros. Ltd.* AIR [1929] Cal. 97, 99 Rankin CJ, summed up the effect of those words appearing in the parallel legislation in both the Indian and English jurisdictions:

> The Arbitration Act of 1889 and the Indian Arbitration Act for the best of good reasons have not required that the agreement to submit should be signed by both parties. What has been required is a written agreement to submit and *Baker's* case (*Baker v. Yorkshire Fire & life Assurance Co.* [1892] 1 QB 144), *Hickman's* case (*Hickman v. Kent or Rodney Marsh Sheep-Breeders Association* [1915] 1 Ch. 881) and the case of *Anglo Newfoundland Development Co.* (*Anglo Newfoundland Development Co. v. Regem* [1920] 2 KB 214) show that it is illegitimate to import into the Statute the requirement of a signature by both parties.
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> This it seems to me has nothing to do with estoppel. In the case of *Baker v. Yorkshire Fire and Life Assurance Co.* [1892] 1 QB 144, the plaintiff brought the suit upon a policy. No doubt he was estopped from asserting that he had not assented to an arbitration clause, but he was not estopped from asserting that he had not signed the arbitration clause. In *Hickman's* case, Astbury, J, lays down the law in the following terms which were afterwards accepted by the Court of Appeal in the *Anglo Newfoundland Development Company's* case:
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> > The result of these decisions is, I think, that if the submission is in writing and is binding ,on both parties as their agreement or as the equivalent in law to an agreement between them, the statute is satisfied
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> and as Bankes LJ., pointed out following the decision in *Baker's* case it is not necessary that both parties should have signed the written agreement. If a person has accepted the written agreement and acted upon it he is bound for this purpose although he may not have set his hand to the document.

This view was endorsed by the Supreme Court of India in *Union of India v. Rallia Ram* AIR [1963] SC 1685 where Shah J, said (at p. 1689):

> The authority of an arbitrator depends upon the authority conferred by the parties by agreement to refer their differences to arbitration. By s. 2(a) of the Arbitration Act 1940 'arbitration agreement' means 'a written, agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not'. A writing incorporating a valid agreement to submit differences to arbitration is therefore requisite: it is however not a condition of an effective arbitration agreement that it must be incorporated in a formal agreement executed by both the parties thereto, nor is it required to be signed by the parties.

In *Shankar Lal v. Jainey Bros.* AIR [1931] All. 136 Young J, said (at p. 138):

> It is clear on the authorities both in England and in India that the terms of a written agreement may be collected from a series of documents, and a 'written agreement' does not mean that each party has to sign a document containing the terms. The plain acceptance of a document containing all the terms is sufficient. ... Further, we are of opinion that a written agreement does not in the Arbitration Act mean that the signatures of the parties is a necessary ingredient. ... The Act merely specifies a written agreement, and we see no reason to read into the plain words of the Act that the execution of a submission to arbitration is necessary. All that is required is that both parties accept a written document as containing the agreed terms: it might be in the form of a signed document by both parties containing all the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or in the third case, an unsigned document containing the terms of the submission agreed to orally by both parties. A written contract does not mean a contract which is proved by documentary evidence, but one in which the terms are expressed in writing in the act of making it.

These are cases decided when the doctrine of estoppel was in an embryonic state. Much learning has been added to the subject since then. That an agreement may be established by an estoppel was accepted by the Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, where (at p. 344) recognition was accorded to the wide scope of the doctrine:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.
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> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v Liverpool*

Victoria Friendly Society [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v. Maher* [1988] 164 CLR 387) and to create binding obligations where none previously existed (see, *Spiro v. Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v. Calgary Milling Co Ltd* [1919] 48 DLR 295; *De Tchihatchef v. Salerni Coupling Ltd* [1932] 1 Ch 330; Taylor Fashions.

So too here. The respondent having regard to its conduct which I have earlier described cannot now be heard to say that the arbitrator lacked jurisdiction. To permit to do so would, in my view, be unjust.

I would therefore resolve the second issue against the respondent. In the view I have formed of the law and the facts of this case, the respondent is in all the circumstances precluded from asserting that the arbitrator had no jurisdiction to adjudicate upon the disputes raised before him.

For the reasons already given, I would allow this appeal and reverse the decision of the learned judge. The declarations granted by the High Court are set aside. The respondent's originating summons dated 8 May 1998 is dismissed. The respondent will pay the appellant the costs of this appeal and those in the court below. The security deposit lodged in court is to be refunded to the appellant. The arbitration is to proceed soonest possible.

My learned brothers Mokhtar Sidin and Haidar Mohd. Noor JJCA have seen this judgment in draft and agree with the reasoning and the conclusions therein.

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